

OPINION AND ORDER

Appellant was suspended from duty based upon a charge of misuse of a government-owned vehicle. He appealed to the Board's Boston Field Office, and a hearing was conducted by the presiding official assigned to his case. However, before the initial decision was issued, the presiding official resigned. Another presiding official was assigned to the case, and he issued an initial decision, affirming the 30-day suspension, without conducting a further hearing in the matter.

By ORDER dated January 23, 1980, the Board reopened the case to address the issue of whether a presiding official who did not hear the testimony given at a hearing in the case may render an initial decision.

Initially, both parties objected to the substitution of another presiding official who would decide the case without rehearing it. The objections were overruled by the Chief Appeals Officer of the Field Office, however, on the basis that he and the original presiding official had agreed on the credibility findings after informal discussions and examination of the record.¹

In his brief to the Board, the appellant argued that the adjudication of his case by a presiding official other than the one who heard testimony denied him due process. He asserted that the presiding official's findings with respect to the credibility of witnesses were so central to his case that they directly affected its outcome. He urged the Board to find that, under these circumstances, it was improper to substitute a presiding official who did not personally preside at the hearing. In its brief, the agency did not renew its previous objection but, instead, contended that, since the decision did not involve the weighing of the demeanor of a witness giving conflicting testimony, the substitution of a new presiding official was proper.

The Board does not agree with the agency's contention that the presiding official was not required to resolve conflicting testimony in this case. In fact, the presiding official found ". . . a number of discrepancies . . ." between statements and testimony given by the appellant. Initial decision at 4. Findings also were made that the appellant's testimony was ". . . obviously self-serving and somewhat less than credible . . ." and that ". . . the preponderance of the credible evidence . . ." established that appellant used his government vehicle for personal reasons.

¹The Chief Appeals Officer assigned himself to the case and decided it as the new presiding official.

Initial decision at 4-5. These findings of the presiding official demonstrate that the credibility of witnesses was a factor in this case and that issues material to the outcome of the case were resolved by the presiding official on the basis of his credibility findings.

Where there is conflicting testimony on material issues, and the hearing officer is replaced before making a decision, the testimony should be heard again. See *VanTelaar v. Binder*, 365 F.Supp. 1007 (D.C.Md. 1973); *Gamble-Skogomo, Inc. v. F.T.C.*, 211 F.2d 106 (8th Cir. 1954); See also Davis, *Administrative Law Treatise*, 11:18-20.

When the initial decision contains credibility determinations which are material to the outcome of the case, the Board holds that the presiding official's findings should be made, absent unusual circumstances, from personal observation of the witnesses' demeanor while testifying at the hearing in a case where one has been conducted. In this case the credibility determinations were made without benefit of personal observation of the witnesses' demeanor even though both parties requested that the case be reheard. The Board finds that the presiding official erred in the refusing to reschedule this case for hearing.

The initial decision is hereby VACATED and the case is REMANDED to the Field Office for a new hearing and readjudication.

For the Board:

RUTH T. PROKOP.

WASHINGTON, D.C., January 13, 1981